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Letter dated 25 July 1997 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the Secretary-General

Upon instructions from my Government, I have the honour to enclose herewith the text of a legal opinion prepared by an eminent international jurist, Professor Maurice Mendelson, QC, from the United Kingdom of Great Britain and Northern Ireland, in connection with the unilateral application of the Greek Cypriot administration to join the European Union (EU) (see annex).

The said legal opinion, among other points, underlines that by virtue of the provisions of the 1959 London-Zurich Agreements and the Treaty of Guarantee of 1960, the Greek Cypriot administration cannot become a member of EU before Turkey, and cannot even apply to it for membership.

In fact, by its specific language and clear intent, the 1960 Treaties, including the Treaty of Guarantee, ensure that the interests of Turkey and Greece are carefully balanced and that neither one can obtain a preferential relationship over the other insofar as Cyprus is concerned. The opinion offers solid evidence that the Treaty of Guarantee prohibits the membership of Cyprus in EU, unless both Turkey and Greece are already themselves members. In this context, the 1960 Treaties create a clear legal bar to Cyprus joining EU before Turkey.

From its inception, the Turkish Cypriot side and Turkey have objected to the membership process of the Greek Cypriot administration to EU on the above-mentioned ground, and warned that attempts to advance this process further could have serious repercussions on the search for a negotiated settlement in the island.

At a time when EU is making arrangements for its new enlargement, it is of importance that this legal opinion is brought to the attention of the international community.

I should be grateful if you would have the present letter and its annex circulated as a document of the fifty-first session of the General Assembly, under agenda item 58, and of the Security Council.

(Signed) Tuluy TANÇ
Ambassador
Chargé d'affaires a.i.

ANNEX*

OPINION OF PROFESSOR M. H. MENDELSON Q.C. ON THE APPLICATION OF THE REPUBLIC OF CYPRUS TO JOIN THE EUROPEAN UNION

1. I have been asked for my opinion in relation to the application by the Greek Cypriot authorities in Cyprus to join the European Union.

2. In summary, my opinion is that, on a proper construction of the relevant treaties and related instruments, the Greek Cypriot Administration is not entitled in international law to apply to join or, having applied, to join, the European Union whilst Turkey is not a member. Furthermore, as members of the EU and parties to the agreements in question, Greece and the United Kingdom are under an obligation to seek to prevent such accession. Moreover, as a matter of the law of the European Community, there are serious legal obstacles to such accession.

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THE FACTS

3. For reasons which will become apparent, it is desirable to set out the facts at some length.

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4. On 5 February 1959, negotiations commenced in Zurich between the Greek and Turkish Governments regarding a solution to the Cyprus question.[1] It seems that there

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* The present annex is being published as received, without formal editing, in the language of submission only.

[1] Kyriakides, in Blaustein & Flanz, Constitutions of the Countries of the World: s.v. Cyprus (1972), 7.

was consultation with the leaders of the Greek and Turkish Cypriot communities,[2] although this does not appear on the face of the documents which I have seen. Agreement was reached on 11 February 1959 on the establishment of an independent state. Prime Ministers Karamanlis and Menderes initialled a draft Basic Structure of the Republic of Cyprus; a draft Treaty of Guarantee between the Republic of Cyprus of the one part, and Turkey, Greece and the UK on the other; and a draft Treaty of Alliance between Cyprus, Turkey and Greece. These documents were drawn up in French and became known as the Zurich Agreement. The Zurich Agreement represented a compromise between the Greek Cypriot community which was pushing for union or "*enosis*" with Greece and the Turkish Cypriot community which was pressing for partition of the island ("*taksim*")[3].

5. Also on 11 February 1959, the Greek and Turkish Foreign Ministers, Messrs Averoff and Zorlu, flew to London to consult the United Kingdom Secretary of State for Foreign Affairs. It was agreed in those consultations that certain areas of Cyprus would remain under the sovereignty of the United Kingdom. I have consulted the minutes of the meeting held at the Foreign Office on 12 February 1959 attended by the Foreign Ministers of the United Kingdom, Turkey and Greece. According to these minutes, the United Kingdom Foreign Secretary stated that, if agreement could be reached between the Three Powers, then the Greek and Turkish Cypriot delegations could be invited to London for a conference. M. Averoff advised that his Prime Minister had explained the

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[2] Necatigil, The Cyprus question and the Turkish position in international law, (2nd ed., 1996), p. 9. Although this author, as a high official in the Turkish Cypriot administration, may be thought to be *parti pris*, his account of the facts which I have cited here appears to be accurate. So far as the legal analysis is concerned, most of the authors whose writings I have examined are anxious to advance a particular point of view: for my part, I have attempted to reach my own independent conclusions.

[3] Redmond, The Next Mediterranean Enlargement of the European Community: Turkey, Cyprus & Malta? (1993), p. 74.

Zurich Agreement to Archbishop Makarios, whose response had been favourable and who would be seeing the actual documents that evening; the Greek Cypriot community would agree to anything the Archbishop himself agreed to.

6 The Foreign Secretary then asked a number of questions about the Zurich Agreement documents. The first concerned the second paragraph of Article 1 of the Treaty of Guarantee. Article 1 reads as follows:

> The Republic of Cyprus undertakes to ensure the maintenance of its independence, territorial integrity and security, as well as respect for its Constitution.
>
> It undertakes not to participate, in whole or in part, in any political or economic union with any State whatsoever. With this intent it prohibits all activity tending to promote directly or indirectly either union or partition of the Island." [4]

7 The question was whether the second paragraph was intended to preclude Cypriot membership of all international associations, for example the [European] Free Trade Area (if it ever came into existence). M. Zorlu, explained that the paragraph was "intended to prohibit partition and Enosis (either with Greece or any other country)". M. Averoff agreed - "the wording was specifically designed to exclude possible Greek devices in the direction of Enosis, such as a personal union of Cyprus and Greece under the Greek Crown." "M. Zorlu and M. Averoff both made it clear that there would be no objection to Cypriot membership of international associations of which *both* Greece and Turkey were members e.g. the [Universal] Postal Union, and any Free Trade Area.

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[4] Conference on Cyprus, Cmnd. 679. As previously indicated, the authentic text of the Zurich Agreement is in French; but there is no material difference between this and the official English translation, though in some cases to which I refer below the French text helps to clarify the English. As will also be noted below, the formal Treaty of Guarantee was actually executed in English as well as French.

8. A question also arose in connection with paragraph 23 of the Basic Structure. This provided:

> The Republic of Cyprus shall accord most-favoured-nation treatment to Great Britain, Greece and Turkey for all agreements whatever their nature.
>
> This provision shall not apply to the Treaties between the Republic of Cyprus and the United Kingdom concerning the bases and military facilities accorded to the United Kingdom.

Lord Perth observed that, as drafted, this might do economic harm to Cyprus. To this, the Foreign Ministers of Turkey and Greece replied that the maintenance of Commonwealth preference would not be excluded: "The intention was to exclude more favourable bilateral agreements between Cyprus and countries other than the Three Powers, and *also to avoid the possibility of either Greece or Turkey securing a more favourable economic position in Cyprus than the other - of Greece, for example, establishing a kind of economic enosis*" (my italics).

9. On 17 February 1959, the United Kingdom Government declared that it had examined the Zurich Agreement and that "taking into account the consultations in London from February 11 to 16, 1959, between the Foreign Ministers of Greece, Turkey and the United Kingdom", it accepted those documents as the agreed foundation for the final settlement of the problem of Cyprus, subject to, in particular, the retention by the UK of two sovereign base areas, and provision being made by agreement for the "protection of the fundamental human rights of the various communities in Cyprus".[5]

10. On 17 and 19 February 1959, a Memorandum was signed at Lancaster House in London by the Prime Ministers of the United Kingdom, Turkey and Greece.[6] In it, they (1) noted the declarations by the representatives of the Greek Cypriot and Turkish

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[5] 164 British & Foreign State Papers (1959-60), 1.
[6] Conference on Cyprus, Cmnd. 679.

Cypriot communities accepting the documents annexed to the Memorandum as the "agreed foundation for the final settlement of the problem of Cyprus" and (2) adopted these documents accordingly as the agreed foundation. It should be noted that, in accordance with this, all of the documents discussed below were signed or initialled, not only by representatives of the Three Powers, but also by those of the Greek Cypriot and Turkish Cypriot communities, respectively.

11. The documents annexed to the memorandum are listed as:

A - Basic Structure of the Republic of Cyprus;

B - Treaty of Guarantee between the Republic of Cyprus and Greece, the United Kingdom and Turkey;

C - Treaty of Alliance between the Republic of Cyprus, Greece and Turkey;

-these three being the main Zurich Agreement documents -

D - Declaration made by the Government of the United Kingdom on February 17, 1959 (described above, para.9);

E - Additional Article to be inserted in the Treaty of Guarantee;

F - Declaration made by the Greek and Turkish Foreign Ministers on February 17, 1959;

G - Declaration made by the Representative of the Greek-Cypriot Community on February 19, 1959;

H - Declaration made by the Representative of the Turkish-Cypriot Community on February 19, 1959;

I - Agreed Measures to prepare for the new arrangements in Cyprus.

12. All of these documents were signed or initialled, as the case may be, by representatives of the UK, Turkey and Greece, as well as by the representatives of the two communities, save for the Agreed Measures, which was initialled only by the

representatives of the three Guarantor States. I analyse these documents more fully immediately below.[7]

A - Basic Structure of the Republic of Cyprus

13. This document provides the framework for the future constitution of the future Republic of Cyprus ("RC"). Article 1 provides that the President shall be Greek and the Vice-President shall be Turkish, elected by their respective communities by universal suffrage.

14. Article 8 provides that "The President and the Vice-President, separately and conjointly, shall have the right of final veto on any law or decision concerning foreign affairs, except the participation of the Republic of Cyprus in international organisations and pacts of alliance in which Greece and Turkey both participate, or concerning defence and security as defined in Annex I." The grammatical structure of this provision is somewhat peculiar, and some clarification can be obtained by comparing it with the French text of the draft Basic Structure in the Zurich Agreement: "Le Président et le Vice-Président auront séparément et conjointement le droit de veto définitif sur toute loi ou décision se référant aux affaires étrangères sauf la participation de la République de Chypre à des organisations internationales et pactes d'alliance dont la Grèce et la Turquie font toutes deux parties, à la défense et à la sécurité telles que définies dans l'annexe I." This confirms that the Vice-President (as well as the President) is to have a power of veto over all questions of foreign affairs except the participation of Cyprus in international organizations in which *both* Turkey and Greece are members. In other words, he retains his veto over membership of organizations of which only *one* of the two States is a member - which, of course, includes the European Union.

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[7] On the same day, the Colonial Secretary (Mr. Alan Lennox-Boyd) confirmed (amongst other things) that the Turkish community should have an equal right with the Greek community to determine its future status: Parliamentary Debates, House of Commons (1956-7), vol. 562, col. 1268. On 26 June 1958, the Prime Minister (Harold Macmillan) described the Colonial Secretary's statement as a "pledge"; *Ibid.*, vol. 590, col. 729.

15. Article 21 provides:

A Treaty guaranteeing the independence, territorial integrity of the constitution of the new State of Cyprus shall be concluded between the Republic of Cyprus, Greece, the United Kingdom and Turkey. A Treaty of military alliance shall also be concluded between the Republic of Cyprus, Greece and Turkey.

These two instruments shall have constitutional force. (This last paragraph shall be inserted in the Constitution as a basic article.)

16. Article 22 provides as follows: "It shall be recognised that the total or partial union of Cyprus with any other State, or a separatist independence for Cyprus (i.e. the partition of Cyprus into two independent states), shall be excluded."

17. Article 23 provides that:

The Republic of Cyprus shall accord most-favoured nation treatment to Great Britain, Greece and Turkey for all agreements whatever their nature.

This provision shall not apply to the Treaties between the Republic of Cyprus and the United Kingdom concerning the bases and military facilities accorded to the United Kingdom.

18. Article 27 provides that all of the Articles in the Basic Structure "shall be basic articles of the Constitution of Cyprus".

B - Treaty of Guarantee

19. The second document whose terms were agreed at the 1959 London Conference was the Treaty of Guarantee between the Republic of Cyprus of the one part, and Greece, the United Kingdom and Turkey of the other. It should be noted, however, that the actual treaty itself was signed at Nicosia and came into force only on 16 August

1960, the date of independence.[8] The treaty was drawn up in English and French, both texts being equally authoritative. In some respects, the French casts further light on the English, and in these cases I will quote both.

20. In Article I,

The Republic of Cyprus undertakes to ensure the maintenance of its independence, territorial integrity and security, as well as respect for its Constitution.

It undertakes not to participate, in whole or in part, in any political or economic union with any State whatsoever. It accordingly declares prohibited[9] all activity likely[10] to promote, directly or indirectly, either union with any other State[11] or partition of the Island. (Elle assume l'obligation de ne participer intégralement ou partiellement à aucune union politique ou économique avec quelque Etat que ce soit. Dans ce sens elle déclare interdite toute activité de nature à favoriser directement ou indirectement aussi bien l'union avec tout autre Etat que le partage de l'Ile.)

21. In Article II,

Greece, Turkey and the United Kingdom, taking note of the undertakings of the Republic of Cyprus set out in Article I of the present Treaty, recognise and guarantee the independence, territorial integrity and security of the Republic of Cyprus, and also the state of affairs established by the Basic Articles of its Constitution.[12]

Greece, Turkey and the United Kingdom likewise undertake to prohibit, so far as concerns them[13], any activity aimed at promoting, directly or indirectly, either union of Cyprus with any other State or partition of the Island.

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[8] UK Treaty Series No. 5 (1961), Cmnd. 1253.

[9] The London Conference text said "With this intent it prohibits" - but nothing appears to turn on this change of wording.

[10] The London Conference text said "tending".

[11] The London Conference text omits the words "with any other State".

[12] The London Conference text had, in place of the words following the final comma, "as well as respect for its Constitution". The change is no doubt due to the fact that, in 1959, the Constitution had yet to be drafted.

[13] The original London Conference text used the phrase "as far as lies within their power" here.

22. Article III, which was not included in the original Zurich version of the Treaty of Guarantee but was included in the version finally adopted in 1960, contains an undertaking by the RC, Greece and Turkey to respect the British sovereign base areas and a guarantee by them of the use and enjoyment by the United Kingdom of the rights secured by the Treaty of Establishment concluded on the same date between the UK on the one hand, and the RC, Greece and Turkey on the other.[14]

23. Article IV of the Treaty of Guarantee provides:

> In the event of a breach of the provisions of the present Treaty, Greece, Turkey and the United Kingdom undertake to consult together with respect to the representations or measures necessary to ensure observance of those provisions.
>
> In so far as common or concerted action may not prove possible, each of the three guaranteeing Powers reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty.[15]

C - Treaty of Alliance

24. This agreement, between the RC, Turkey and Greece, seems of small relevance to the present question. It may, however, be noted that, in Article 2, the Parties "undertake to resist any attack or aggression, direct or indirect, directed against the independence and territorial integrity of the Republic of Cyprus".

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[14] See below, paragraph 33 for the Treaty of Establishment.

[15] Again, there are small variations between this text and the one agreed at Zurich, but they do not seem material.

D - Declaration by the UK Government

25. This concerns in particular the retention of the British sovereign base areas and certain other matters, and has already been outlined in paragraph 9 above.

E - Additional Article to be inserted in the Treaty of Guarantee

26. This concerns the retention by the UK of its two sovereign base areas and has already been discussed in connection with the Treaty of Guarantee.

F - Declaration made by the Greek and Turkish Foreign Ministers

27. This accepts the Declaration made by the United Kingdom Government (D above), and also the Zurich Agreement, which together provide "the agreed foundation for the final settlement of the problem of Cyprus".

G - Declaration made by the Representative of the Greek-Cypriot community

28. By this, Archbishop Makarios declares that he has examined the Zurich Agreement and the Declarations of 17 February 1959 made by the Three Powers, and accepts these documents as the agreed foundation for the final settlement of the problem of Cyprus. This document was initialled by the representatives of the Three Powers and by Dr Kutchuk on behalf of the Turkish Cypriot community.

H - Declaration made by the Representative of the Turkish-Cypriot community

29. *Mutatis mutandis*, this is identical to G above.

I - Agreed measures to prepare for the new arrangements in Cyprus

30. These comprised certain transitional measures, as well as the establishment of a Joint Commission in Cyprus to complete a draft Constitution, incorporating the Basic Structure agreed at the Zurich Conference and "scrupulously observ[ing]" the Zurich Agreements generally. (This Commission was to be made up of one representative from each of the two Cypriot communities, plus one representative each from Greece and Turkey.)

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31. In July 1960, the relevant United Kingdom Ministers reported to Parliament on the progress of the measures to implement the conclusions of the London Conference.[16] They stated that the Joint Commission had completed its work on 6 April 1960, when the draft Constitution was signed in Nicosia; although the Government was not represented on the Commission, it had seen the draft and had no comments to make on it. They noted that the Government was a guarantor of the Basic Articles of the Constitution, the draft of which was attached. They added that elections had been held in December 1959 and that Archbishop Makarios and Dr Kutchuk had been returned as President and Vice-President elect of the Republic. They further reported that a Joint Committee, following what appear to have been quite extensive negotiations in London and Cyprus, had reached agreement on the drafting of the relevant treaties on 1 July 1960. The agreed draft Treaties are annexed to the report.

32. The United Kingdom Parliament then passed the Cyprus Act, enabling independence to be granted to the Republic. Pursuant to the Act, the Republic of

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[16] Cmnd. 1093.

Cyprus Order in Council, 1960 came into operation on 10 August 1960.[17] This provided that the constitution set out in the documents in the Greek and Turkish languages, which were initialled at Ankara on 28 July 1960 by representatives from all five parties as the Greek and Turkish texts of the Constitution of the Republic of Cyprus, should come into force on 16 August 1960.

33. On 16 August 1960 in Nicosia, the Treaties of Guarantee, of Alliance and of Establishment were signed by the parties, and independence was declared. The first two Treaties have already been discussed. The Treaty of Establishment[18] was drawn up between the RC of the one part, and the Three Powers of the other, in implementation of the UK Declaration made at the London Conference and the consequential Declarations made by the representatives of the other four parties (D, F, G & H above). It mainly concerns the British sovereign base areas, state succession, and the like.[19]

The Constitution[20]

34. The Constitution which was drawn up reflects and expands on the Zurich and London Agreements, especially the Basic Structure. Article 1, in providing for a Greek Cypriot President and a Turkish Cypriot Vice-President, mirrors the corresponding

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[17] Statutory Instrument No. 1368 of 1960.

[18] UK Treaty Series No. 4 of 1961, Cmnd. 1252.

[19] It should, however, perhaps be noted that, with regard to the requirement in the UK Declaration that Cyprus should guarantee human rights, the RC guaranteed human rights comparable to those set out in the European Convention on Human Rights and First Protocol, and that Article 1 stipulates in pertinent part that the territory of the Republic of Cyprus shall comprise the Island of Cyprus together with the islands lying off its coast, with the exception of the United Kingdom's military bases. Article 10 provides for arbitration in case of disagreement.

[20] The Constitution of the RP was drawn up in Greek and Turkish (Art. 180), but I must rely on the translation in Blaustein & Flanz (eds.), Constitutions of the Countries of the World (1972).

Article in the Basic Structure, whilst Article 50 implements Article 8, in providing (in pertinent part) that "The President and the Vice-President of the Republic, separately or conjointly, shall have the right of final veto on any law or decision of the House of Representatives or any part thereof concerning - (a) foreign affairs, except the participation of the Republic in international organisations and pacts of alliance in which the Kingdom of Greece and the Republic of Turkey both participate."[21] This is complemented by Art. 169, which provides that the Council of Ministers shall be responsible (subject, in most cases, to the agreement of the House of Representatives) for the conclusion of international agreements, but makes a saving in Art. 57(3) by providing that if any decision made by the Council of Ministers is of the type referred to in Art. 50, the President and/or Vice-President have a right of veto, which they are to exercise within four days of the date when the decision was transmitted to their respective offices.

35. Article 170 implements Article 23 of the Basic Structure. It reads in pertinent part: "(1) The Republic shall, by agreement on appropriate terms, accord most-favoured-nation treatment to the Kingdom of Greece, the Republic of Turkey and the United Kingdom of Great Britain and Northern Ireland for all agreements whatever their nature might be."

36. Article 179 provides that the Constitution shall be the supreme law of the Republic and that no law or decision of the House of Representatives, the Communal Chambers, or any other authority shall be repugnant to, or inconsistent with, any of its provisions, whilst Art. 180 provides for adjudication of constitutional questions by the Supreme

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[21] For this purpose, the Article goes on to define "foreign affairs" to include (*inter alia*) "the conclusion of international treaties, conventions and agreements". See also Art. 47(m).

Constitutional Court. The latter article, as well as providing for the reconciliation of conflicts between the texts in the two official languages, goes on to say that "In case of ambiguity any interpretation of the Constitution shall be made by the Supreme Constitutional Court due regard being had to the letter and spirit of the Zurich Agreement ... and of the London Agreement...".

37. Article 181 implements Article 21 of the Basic Structure by providing that the Treaties of Guarantee and Alliance shall have constitutional force.

38. Although, under Article 182(2) & (3), most provisions of the Constitution can be amended or repealed by a majority vote comprising at least two-thirds of the total number of the Representatives belonging to the Greek Community and a like number of Representatives from the Turkish Community - itself a formidable barrier to amendment - there is an important exception in para. (1). This implements Article 7 of the Basic Structure, and provides that the Basic Articles (set out in Annex III of the Constitution) "which have been incorporated from the Zurich Agreement ... are the basic Articles of this Constitutional and cannot, in any way, be amended, whether by way of variation, addition or repeal". All of the articles mentioned in the present survey of the Constitution are included in this Annex, save for Articles 169 and 179.

39. Article 185 provides that the territory of the Republic "is one and indivisible" and goes on to state in paragraph (2) that "The integral or partial union of Cyprus with any other State or the separatist independence [*sic*] is excluded." This implements Article 22 of the Basic Structure, which defines "separatist independence" as "the partition of Cyprus into two independent States".

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40. Although the Turkish Cypriot community approved of the Constitution, which provided in a detailed way for power-sharing in every aspect of the life of the Republic, the Greek Cypriots soon objected to the Constitution they had agreed to, precisely because they objected to this sort of power-sharing. Major constitutional differences arose between the two communities. No agreement could be reached on the establishment of an army, the Greeks wanting a mixed army and the Turks wanting separate units. Nor could agreement be reached on the setting up of separate municipalities. The Turks also complained that the constitutional requirement that 30 *per cent* of the public service be made up of Turkish Cypriots had not been complied with. By December 1961, the Turkish Cypriots in the House of Representatives were refusing to support the enactment of tax laws in protest at the Government's failure to implement the Constitution.[22]

41. The Supreme Constitutional Court was composed of an independent President, Professor Ernst Forsthoff of Heidelberg University, and two judges from the Turkish and Greek Cypriot communities. The President resigned with effect from 15 July 1963 as a result of Archbishop Makarios' statement that he would not comply with the decision of the Supreme Constitutional Court regarding municipalities.[23]

42. On 12 September 1963, Turkey and the European Communities signed an association agreement, effective on 1 December 1964.

43. On 3 December 1963, Archbishop Makarios, who had frequently expressed his dissatisfaction with the constitutional arrangements (even though he was party to them) publicly announced his thirteen point proposal for amendment of the Constitution and

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[22] See e.g. Kyriakides, *op. cit.*, n. 1 above.
[23] Necatigil, *op. cit.*,, n. 2 above, p. 21.

informed the Guarantor powers of the proposal Several of these proposals, such as the abolition of the right of veto, would have amended unamendable articles of the Constitution. Turkey and the Turkish Cypriots rejected the Archbishop's proposal on 16 December 1963. On 21 December 1993, inter-communal violence began.[24]

44. The Foreign Affairs Committee of the British House of Commons held in their 1987 Report that "There is little doubt that much of the violence - which the Turkish Cypriots claim led to the total or partial destruction of 103 villages and the displacement of about a quarter of the total Turkish Cypriot population - was either directly inspired by, or certainly connived at, by the Greek Cypriot leadership."[25] The Committee also commented:

> In brief, the outcome of the 1963 crisis was the collapse of the system of government established under the 1960 settlement. Although the Cyprus Government now claims to have been seeking to "operate the 1960 Constitution, modified to the extent dictated by the necessities of the situation", this claim ignores the fact that both before and after the events of December 1963 the Government of President Makarios continued to advocate the cause of *Enosis* and actively pursued the amendment of the Constitution and the related Treaties to facilitate his ultimate objective.[26]

45. On 25 December 1963, Turkish jet fighters overflew the island. This enabled the Turkish army contingent, stationed pursuant to the Treaty of Alliance, to move away from the Greek contingent to a camp on the Nicosia-Kyrenia road. It seems that, on 1 January 1964, Archbishop Makarios announced his decision to abrogate the Treaties of Guarantee and Alliance, but that, after discussions with British representatives, he issued

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[24] *Ibid.*, p. 24.

[25] House of Commons Papers, 1986-87, Nos. 21-24; No. 21 at paragraph 27.

[26] *Ibid.*, paragraph 31. Indeed, on 26 June 1967 the Greek Cypriot House of Representatives unanimously passed a resolution affirming its intention to continue to struggle for *enosis*.

a new statement that his Government merely sought "to secure the termination of these treaties by appropriate means".[27]

46. In March 1964, the United Nations Security Council decided to send a peacekeeping force to the Island.[28] (The Republic had joined the UN in September 1960.)

47. After the outbreak of the inter-communal violence, the Turkish Cypriot Vice-President and ministers and the Turkish Cypriot Members of the House of Representative were prevented from attending their ministries or meetings. The Greek Cypriot government announced that it no longer recognised Dr Kutchuk in his capacity as Vice-President. The UN peacekeeping force conveyed the request by the Turkish Cypriot Members to return to the House, and was told that they would only be allowed to return if they accepted constitutional changes enacted in their absence by the Greek Cypriot members.[29]. It appears that Turkish Cypriot judges attended the courts in Greek Cypriot controlled areas until 2 June 1966, on which date they were stopped at checkpoints near the law courts and prevented from further attending.[30]

48. A number of Statutes were enacted to amend the Constitution including Basic Articles of the Constitution. For instance, the Electoral (Transitional Provisions) Law 1965 abolished separate Greek and Turkish Cypriot electoral rolls in breach of Articles 1

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[27] Necatigil, p. 46.

[28] SC res. 186 (1964).

[29] UN Secretary General's Report S/6569 of 29 July1965, paras 7-11, cited in the Foreign Affairs Committee 1987 Report (above, n. 25), paragraph 31. I note that it is Greece's position that the Vice President publicly declared that the Republic of Cyprus had ceased to exist and, "along with the three Turkish Cypriot ministers, the Turkish Cypriot members of the House and the Turkish Cypriot civil servants withdrew from the Government": Greece's International Position. 3. The Cyprus Issue (no date), p. 3.

[30] Necatigil, pp. 62-3.

(a Basic Article) and Article 63. Amongst other consequences, this prevented the Turkish community from electing a Turkish Vice-President. This was the subject of protest notes from two of the Guarantor powers, the United Kingdom and Turkey[31].

49 From December 1963 onwards, there emerged two administrations: a Greek Cypriot administration operating under name of the Government of the RC, and a Turkish Cypriot administration which in due course took the title of "Provisional Cyprus Turkish Administration".

50. Between 1968 and 1974, inter-communal talks were held, without a resolution of the conflict.

51. On 21 May 1973, the European Communities and the Republic of Cyprus signed an association agreement.

52. On 2 July 1974, Archbishop Makarios wrote to the President of Greece asking him to withdraw the military junta's officers from Cyprus after he had discovered evidence that they were plotting to kill him and were seeking to achieve *enosis* by abolishing the Republic[32].

53. On 15 July 1974, Greek officers of the National Guard, with the connivance of the mainland Greek junta, led a *coup d'état* against the government of Archbishop Makarios with the intention of overthrowing him and setting up a government to unite Cyprus with Greece, ceding some of the territory of the Island to Turkey. Mr Nicos Sampson, a former EOKA member, was purportedly installed as President. However, the

[31] Hansard, vol. 709, col. 466f, cited in Necatigil, op. cit., p. 57.
[32] 'The Times', 21 July 1974, cited in Necatigil, p. 88.

Archbishop escaped and broadcast the need for resistance. The Presidential Palace was in ruins, a curfew was imposed, and massacres were being reported. The Archbishop was flown to London and reported that both communities were suffering as a result of the coup.[33] On 18 July, in the Security Council, he again complained about a Greek invasion and about the aggressive violation of the sovereignty and independence of the RC.[34]

54. On 17 July 1974, the Turkish Premier flew to London to discuss joint action with the United Kingdom pursuant to the Treaty of Guarantee. The United Kingdom declined to act.[35]

55. On 20 July 1974, Turkey intervened militarily in Cyprus by sea and air with the declared intention, as co-guarantor, of restoring the independence and constitutional order of Cyprus and ending the aggression.[36]

56. On the same day, the UN Security Council adopted Resolution 353, which stated that it was "concerned about the necessity to restore the constitutional structure of the Republic of Cyprus, established and guaranteed by international agreement", called for all military personnel other than those present under the authority of international agreements to be withdrawn, and for the Guarantor powers to "enter into negotiations

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[33] Necatigil, p. 89.

[34] SC Official Records, 1780th mtg., p. 3.

[35] Necatigil, p. 94. The reasons were not stated expressly, but seem to have been political rather than legal.

[36] *Ibid.* It will be recalled that, under the second paragraph of Article 3 of the Treaty of Guarantee, "In so far as common or concerted action may prove impossible, each of the three guaranteeing Powers reserves the right to take action with the sole aim of re-establishing the state of affairs established by the present Treaty".

without delay for the restoration of peace in the area and constitutional government in Cyprus..."

57. On 23 July 1974, the Greek military junta called a cease-fire and the following day handed over power to a civilian government.[37]

58. Meanwhile, foreign newspapers carried reports of destruction of Turkish villages, massacres of Turkish Cypriots and killings on both sides. The *Herald Tribune* reported that 1,750 Turkish men were being kept behind barbed wire in an open-air football stadium. Famagusta was under siege from mortar attack.[38]

59. On 30 July 1974, the Foreign Ministers of the Guarantor powers issued the Geneva Declaration[39] and agreed that there should be re-establishment of constitutional government in Cyprus. Among the matters to be discussed should be the "immediate return to constitutional legitimacy, the Vice-President assuming the functions provided for under the 1960 Constitution" - an acknowledgement that the situation obtaining since 1963 had not been constitutional. The Ministers further noted "the existence in practice in the Republic of Cyprus of two autonomous administrations, that of the Greek Cypriot community and that of the Turkish Cypriot community". They also signed a "Brief Statement" in which they made it clear that their adherence to that declaration "in no way prejudiced their respective views on the interpretation or application of the 1960 Treaty of Guarantee or their rights and obligations under that Treaty". They agreed that further talks should begin on 8 August 1974. However, those talks broke down on 14 August 1974.

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[37] *Ibid.*, p. 96.
[38] *Ibid.*, p. 99.
[39] *Ibid.*, p. 424.

60. Further military action following the breakdown of the talks resulted in the securing of territory in the north of the Island under the administration of the Turkish Cypriots.

61. In December 1974, the Archbishop returned to Cyprus and resumed the Presidency.

62. On 12 January 1975, Greece applied for full membership of the European Community.[40]

63. On 13 February 1975, the Turkish Federated State of Cyprus was proclaimed. The Security Council passed resolution 367 on 12 March, which *inter alia* called on all States and the parties concerned "to refrain from any action which might prejudice the sovereignty, independence, territorial integrity and non-alignment of the RC, as well as from any attempt at partition of the island or its unification with any other country"; regretted the proclamation; but also affirmed that it did not prejudice the final political settlement of the problem of Cyprus and took note of the declaration that this was not the intention.

64. In August 1975, both sides agreed at inter-communal talks in Vienna to voluntary regrouping of populations, the Turkish Cypriots in the North of the Island and the Greek Cypriots in the South.[41]

65. On 3 August 1977, Archbishop Makarios died.

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[40] EC Bulletin 1975, No. 6, points 1201-12.
[41] *Ibid.*, pp. 106, 154-5.

66 In 1981 Greece joined the European Community. Previously, on 5 February 1980, the European Community had assured Turkey that Greek accession would not affect its relations with Turkey[42]. In fact, however, Greece has blocked Turkey's attempts to obtain admission to the Community - now the EU.[43]

67 On 15 November 1983, the independent Turkish Republic of Northern Cyprus ("TRNC") was proclaimed by the Legislative Assembly of the Turkish Federated State of Cyprus. Turkey recognised the TRNC the same day. No other state has so far done so.

68 On 18 November 1983, the UN Security Council adopted Resolution 541, in which it "deplored" the proclamation of the TRNC, which it considered to be "incompatible with the 1960 Treaty concerning the establishment of the Republic of Cyprus and the 1960 Treaty of Guarantee" and invalid. It went on to call upon all states "not to recognise any Cypriot state other than the Republic of Cyprus".

69 On 7 May 1985, the Constitution of the TRNC came into force.

70 On 4 July 1990, the administration in Nicosia applied for the RC's accession to the European Communities pursuant to Article 237 of the EEC Treaty, Article 205 of the Euratom Treaty and Article 98 of the ECSC Treaty.

71 On 12 July 1990, the President of the TRNC sent a Memorandum to the Council of Ministers setting out its objections to the application for accession made by the

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[42] Redmond, *op. cit.*, n. 3 above, p. 40.
[43] *Ibid.*, pp. 30, 39.

authorities in Nicosia and advising that it would welcome membership for both communities on settlement of their dispute. A Supplementary Note was added to this, dated 3 September 1990

72. On 30 June 1993, EU the Commission handed down a favourable opinion on Nicosia's application.[44] It is clear that the Commission was motivated in part by a belief that accelerating this process would help bring about a political resolution of the Cyprus dispute. On 4 October 1993, the Council of the European Union concluded that it supported the Commission's approach.

73. On 19 December 1994, Greece vetoed a customs union with Turkey[45].

74. On 6 March 1995, the General Affairs Council of the European Union agreed on the general policy framework for the development of relations with Cyprus. On 16 June 1995, the Association Council of the European Union met for talks which centred on Cyprus's prospective accession to the European Union. On 12 July 1995, the European Parliament adopted a resolution endorsing the Commission's opinion and the Council's conclusions. On 17 July 1995, the Council decided on structured dialogue to bring Cyprus closer to the European Union; and on 21 November 1995, the Council and the authorities in Nicosia concluded a Protocol on financial and technical co-operation. Detailed discussions about accession are due to begin after the conclusion of the EU Inter-Governmental Conference.

75. On 13 December 1995, the European Parliament approved Turkey's accession to the Customs Union with the European Union[46].

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[44] Doc. COM/93/313 final.
[45] Necatigil, p. 411.

76 On 26 November 1996, the UK Foreign Secretary, Mr. Malcolm Rifkind, announced in the House of Commons that it would be "extremely difficult" for a divided Cyprus to be admitted to the EU.[47] The official position of the new Labour Government is still unknown.

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THE LAW

The Relevant International and National Law

77. The duties of the RC and the Guarantor States turn on the proper construction of the London Agreements (in which term I include the Treaties subsequently formally concluded at Nicosia on the basis of what was agreed in London in February 1959 - itself largely on the basis of the Zurich Agreements), together with the (original) Constitution of Cyprus. Before addressing their substantive provisions, it is necessary to consider a series of preliminary questions, relating to the initial validity and possible subsequent cessation of effect of the treaties.

Are the treaties valid in international law?

78. Some commentators sympathetic to the Greek Cypriot view have suggested that the Zurich-London Agreements and the 1960 Treaties may not be valid in

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[46] Press Release by the Republic of Turkey on Internet home page, Relations with EU, Washington DC, 13 Dec. 1995.

[47] From 87 *Cyprus News* (1996), p. 3.

international law because they were imposed on the inhabitants of Cyprus, whose representatives did not have the opportunity of negotiating them.[48]

79. However, the facts outlined above demonstrate that the Greek Cypriot community was advised at an early stage of the details of the Zurich Agreement, and more importantly that they were actually involved in the negotiation of the London Agreement and the 1960 Treaties. For example, in the minutes of the Foreign Office meeting, the Greek Foreign Minister is recorded as advising that Archbishop Makarios had been informed of the Zurich Agreement on, inferentially, either the day of the signing of the Zurich Agreement or the following day; also, that the Archbishop would have the opportunity of reviewing the Zurich Agreement on the evening of 12 February.

80. The London Conference commenced on 17 February 1959 and this was attended by Archbishop Makarios for the Greek Cypriots and Dr Fazil Kutchuk for the Turkish Cypriots. Further, the London Agreement comprises a number of documents including a "Declaration made by the Representative of the Greek-Cypriot Community on February 19, 1959". As stated above, Archbishop Makarios declared in this that he had examined the Zurich Agreement and the Declarations of 17 February 1959 and accepted these as the agreed foundation for the final settlement of the problem of Cyprus. In addition, Archbishop Makarios signed or initialled all the documents comprising the London Agreement, including the Treaties of Alliance and Guarantee, with the exception of the Memorandum of the Conference (which was signed by the Premiers of the Guarantor Powers only) and the Agreed Measures (which was initialled by the Foreign Ministers of the Guarantor Powers only).

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[48] See e.g. Palmer, "The TRNC: Should the United States Recognize it as an Independent State?", 4 *Boston Univ. Int. Law Jl.* (1986), p.425, esp. at pp. 431-3. Cf. Press & Information Office, RC, The Cyprus Problem (1995), pp. 6-8.

81. According to the Agreed Measures, a Joint Committee in London was to prepare the final treaties "giving effect to the conclusions of the London Conference". This was to consist of a representative from each of the Parties including one from the Greek Cypriot community (as well as one from the Turkish Cypriot community). The Joint Committee took fifteen months to complete negotiations, which took place in both London and Cyprus. This strongly suggests that the Greek Cypriots had the opportunity of thoroughly negotiating these Treaties. As a result, the wording of the Treaties of Guarantee and Alliance were slightly amended. (There was no pre-existing draft of the Treaty of Establishment.)

82. On 16 August 1960, the Treaties of Guarantee, Alliance and Establishment were signed in Nicosia; amongst the parties to sign it was Archbishop Makarios, who was by now President-elect.

83. From the above, it does not seem to me to be arguable that the Treaties were imposed on the Greek Cypriot community without their consent. Admittedly, this consent may have been grudging: Archbishop Makarios was at the time strongly in favour of *enosis*. According to the Greek Cypriot Press and Information Office, "the only reason the Cypriot people's representatives signed them was because the sole alternative would have been the continued denial of independence and freedom, continued bloodshed and, possibly, the forced partition of Cyprus".[49] But just because the Greek community had to settle for something less than its ideal does not mean that it or its representatives were coerced within the narrow meaning of coercion to be found in, for instance, Articles 51 and 52 of the Vienna Convention on the Law of Treaties

[49] The Cyprus Problem (n. 48 above), p.6.

1969. So far as I am aware, it has not been suggested that there were any acts or threats directed against the person of the Archbishop, nor the threat of force against the RC itself. Mere inequality of bargaining power does not constitute coercion.

84. It has also been argued that the Treaty of Guarantee is void because Article IV, in allowing for the unilateral use of force to maintain the *status quo* in Cyprus, conflicts with a rule of *ius cogens* (a peremptory norm of general international law) - that is, a norm accepted and recognised by the international community of States as a whole as a principle from which no derogation is permitted. Pausing here, it should be noted that there is considerable disagreement in the international community as to exactly what norms are comprised in this category. It has to be conceded, however, that the prohibition of the use of force against the territorial integrity or political independence of a State is a rule which definitely does fall into this category.[50]

85. But the Vienna Convention is not retrospective;[51] and before 1969 the very existence of *ius cogens* in international law was very much contested. Therefore, even if - for the sake of argument - the provisions permitting intervention would contravene a norm of *ius cogens* under present-day law, it by no means necessarily follows that Article IV of the Treaty of Guarantee - still less the Treaty as a whole - would have been void *ab initio*. It is true that Art. 64 of the Vienna Convention provides that "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates". But first, this does not retrospectively invalidate the treaty; and secondly, even if Art. IV of the Treaty of Guarantee became invalid as the result of an new rule of *ius cogens*, that Article could

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[50] Cf. the International Law Commission's Commentary to Art. 50 of its draft articles on the Law of Treaties, Report of the ILC on the 2nd part of its 17th session and on its 18th Session, GA Off. Records, 21st Sess., Supp. No. 9, p. 76; Military & Paramilitary Activities in & against Nicaragua, ICJ Rep. 1986, pp. 100-1.

[51] Article 4.

very possibly be severed from the rest of the Treaty, and it is Arts. I & II which are in issue here.[52]

86. Furthermore, and very importantly, the Vienna Convention[53] lays down a formal procedure to be followed in the event that a party to a treaty invokes a ground for impeaching its validity of that treaty. This procedure involves a formal notification in writing to the other parties to the treaty. Although the Greek Cypriot administration has from time to time made imputations about the London Agreements, and in particular the Treaty of Guarantee, so far as I am aware, no party has invoked this procedure or taken other formal steps. Indeed, in the case of *Cyprus v. Turkey* before the European Commission of Human Rights, the Greek Cypriot administration, whilst arguing that the Turkish intervention of 1974 violated the Treaty of Guarantee, appears to have accepted the validity of the Treaty as such.[54] This is corroborated by its argument that the establishment of the Turkish Federated State of Cyprus "was incompatible with the constitutional structure of the Republic of Cyprus as envisaged by the Cyprus Constitution and contrary to the Treaties of Establishment and Guarantee...".[55] The Declaration adopted by the Turkish Cypriot Parliament on 15 November 1983 unequivocally states that the TRNC "shall continue to adhere to the Treaties of Establishment, Guarantee and Alliance".[56]

87. In any event, the three Guarantor States themselves do not appear to regard the London agreements as invalid. Turkey certainly does not, and indeed relied on the Treaty of Guarantee to justify its 1974 intervention. So far as Greece is concerned,

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[52] Art. 44 of the Vienna Convention prohibits separation in respect to treaties which contravene Art. 53, but not 64. Cf. also Art. 71(2)(b).
[53] Articles 65-68.
[54] ECHR, 13 Decisions & Reports (1978), p. 116.
[55] *Ibid.*, pp. 119-20.
[56] Paragraph 23(e).

although it maintains that the *Constitution* became unworkable, it has not, I am advised and so far as I know, taken the position that the London Agreements are invalid or not otherwise in force. Indeed, by arguing that the establishment of the TRNC is a violation of the 1960 agreements, and by emphasizing its special position as a "guarantor power with special legal responsibility regarding the Republic of Cyprus" it evidently relies upon them.[57]

88. The United Kingdom apparently does not question the validity of the treaties either. In 1979 the Government spokesman, in explaining why they recognized only one Government in Cyprus, relied expressly on the 1960 agreements.[58] In 1987 Baroness Young, Minister of State at the Foreign and Commonwealth Office, confirmed to the Foreign Affairs Committee of the House of Commons that "We believe that the 1960 Treaty of Guarantee still applies in which we are a guarantor and continue to play that role ...".[59] More recently, the acting head of the Southern European Department of the Foreign and Commonwealth Office swore an affidavit on 25 April 1994 in the case of *R. v. The Commissioners for the Inland Revenue, ex parte Resat Caglar,* in which he asked the Court to take into account "the obligations of the United Kingdom under the Treaty of Guarantee".[60]

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[57] See e.g. Greece's International Position. 3: The Cyprus Issue, pp. 7 & 11. See also the Geneva Declaration by the three Guarantors of 30 July 1974, above, para.60.
For the sake of completeness, I should also deal with the suggestion that the RC's consent to the Treaties of Guarantee and Alliance was not valid, because the House of Representatives did not approve ratification (see e.g. The Cyprus Problem, n. 48 above, p. 8.) But this argument does not seem applicable to a State *in statu nascendi*; and in any case, so far as I know it has not been formally invoked by the Greek Cypriot administration as a ground of invalidity.

[58] Parliamentary Debates (Lords), vol. 401, col. 2024 (25 July 1979).

[59] 1986-87 Session, 3rd Report, Minutes of Evidence, question 100.

[60] "UK Materials on International Law 1994", 65 BYIL (1994) 590.

89. The Security Council, too, has apparently recognized the validity of these agreements more than once. For instance, in Resolution 353 (1974) it pronounced itself "concerned about the necessity to restore the constitutional structure of the Republic of Cyprus, established and guaranteed by international agreement"; and in Resolution 541 (1983), it asserted that the declaration of independence by the TRNC was "incompatible with the 1960 Treaty concerning the establishment of the Republic of Cyprus and the 1960 Treaty of Guarantee".[61] In Resolution 774 of 26 August 1992, it endorsed, as "the basis for reaching an overall framework agreement", the Secretary-General's "Set of Ideas on an Overall Framework Agreement on Cyprus" which, amongst other things, confirms the continuation in force of the 1960 Treaties of Guarantee and Alliance.[62]

90. In conclusion, it appears therefore that an argument based on the invalidity of the London Agreements and the Treaties which resulted from them is unfounded.

Have these Agreements been terminated?

91. Treaties may be terminated by either consent of the parties, or by virtue of a rule of law authorizing their termination[63]. Since there has been no agreement of all the parties to the termination of the Agreements, the only possible question is whether there is a rule of law authorizing such termination.

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[61] There is a possible view that the Security Council and General Assembly have doubts about the validity of the Treaty of Alliance: cf. GA Resolution 33/15 of 1978 and SC Res. 927 (1994), calling for, respectively, a total withdrawal, or a reduction of, foreign troops in Cyprus. However, the Treaty of Alliance does not seem to be in issue in the context of the present Opinion.

[62] UN doc. S/24472 (21 Aug. 1992), paragraph 54.

[63] Cf. Vienna Convention on the Law of Treaties, Arts. 54-72. Suspension of the treaties does not seem to be an issue here.

92. Three grounds of termination could theoretically require consideration: (1) material breach by one of the parties; (2) supervening impossibility of performance; and (3) fundamental change of circumstances.[64] But in the circumstances of the present case it seems unnecessary to inquire further into whether any of these grounds are present here. The reason is that, as just indicated in relation to the alleged initial invalidity of the Treaties, none of the parties seems to have formally sought to terminate the treaties or withdraw from them on any of these grounds - not even the Greek Cypriot administration.[65] And even if I were wrong about the position of the latter, the three Guarantor Powers have not taken this position but, as we have already seen, in fact continue to rely on the Agreements for various purposes. The same is true of the Security Council.

93. So far as the United Kingdom is concerned, to date the official position remains as I have described it above. Indeed, apart from legal considerations, it would be surprising if, even as a matter of policy, the British Government were to perceive it to be in its interest to change that approach, not least for the reason given by the House of Commons Foreign Affairs Committee in 1987:

> The interlocking nature of the founding treaties of the Republic of Cyprus effectively compels the United Kingdom Government to continue to subscribe to the Treaty of Guarantee if the whole edifice *(including British sovereignty over the [Sovereign Base Areas])*[66] is not to collapse. As the Greek Cypriot Foreign Minister so eloquently put it to us in evidence, 'one thing Britain cannot do is to have *à la carte* application of parts of the Treaties only'."[67]

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[64] *Ibid.*, Arts. 60-62. Emergence of a new rule of *ius cogens* has already been discussed.

[65] There may be a suggestion to the contrary so far as concerns the latter's position regarding the Treaty of Alliance; cf. Tornaritis (Attorney-General of the Greek Cypriot administration), Cyprus and its Constitutional and other Legal Problems (2nd ed., 1980), p. 60; but the Treaty of Alliance is not in issue here.

[66] Emphasis added.

[67] 3rd Report, 1987-87 Session, paragraph 10.

The 1960 Constitution

94. The main points of the future constitution of Cyprus were contained in the Basic Structure agreed at Zurich, which was supplemented at the London Conference in 1959.[68] As already indicated, that Conference also adopted "Agreed Measures" providing (amongst other things) for a Joint Commission in Cyprus to complete a draft Constitution incorporating these articles and the relevant provisions of the other agreements reached in Zurich and London. The Joint Commission was to be made up of one representative from each of the parties to the London Agreement (except the UK). The Joint Commission took fourteen months to negotiate the draft Constitution and made some amendments to what was agreed at the London Conference. The draft was signed on 6 April 1960 in Nicosia.

95. The Constitution was given international standing by the Zurich - London Agreements, which the Greek Cypriot representative, Archbishop Makarios, declared he accepted as the "agreed foundation for the final settlement of the problem of Cyprus" - and in particular by the Treaty of Guarantee. I analyse the relevant treaty provisions in the next section; but first, I consider the Constitution itself, for the regime which it establishes is what was guaranteed.

96. The Constitution provides for political equality between the two communities, notwithstanding the numerical superiority of the Greek Cypriots. Accordingly, it contains many checks and balances to maintain this *status quo*, and is more complex and detailed than most constitutions of newly independent states. As we have seen, in 1963, Archbishop Makarios sought to amend the Constitution, including some unamendable provisions; and when the Turkish community withheld its (requisite) approval, he

[68] Above, paragraphs 4-30.

anyway purported to enact certain laws which were clearly incompatible with the Constitution, including its unamendable provisions.

97. National constitutions are often not only amended in accordance with their terms, but also overturned by bloodless or bloody *coups*. If they are overturned, whatever the legality under the "old" constitution, in practice, *if the coup is successful*, the new constitution comes to prevail. And international law does not in general prohibit such acts.[69] However, the case of Cyprus is different. As we have seen, the basic structure of the constitution is guaranteed (and not just by the Guarantor Powers, but by the RC itself) in the Treaty of Guarantee and the Agreed Measures in particular. Furthermore, Article 182 and Annex III made certain articles, including those enshrining the bi-communal arrangements and that giving constitutional force to the Treaties of Guarantee and Alliance,[70] unamendable "Basic Articles".[71] In short, the bi-communal structure of Cyprus was sanctified by "particular" international law, binding on the various parties. But it is arguable that these arrangements also became part of general international law. There may also be similarities here to the status of Switzerland, whose permanent neutrality has long been recognized as part of the general "public law of Europe".[72] Indeed, the similarity is not just due to the fact that this status was initially guaranteed by treaty a limited number of European powers; it extends to the *reason* for that permanent neutrality, which was in large part that, due to the different ethnic composition of the various cantons, if the Swiss Confederation did not maintain its neutrality in wars between or involving France, Italy or Germany, it risked being torn apart.

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[69] Though human rights conventions and customary law may impose some limitations.
[70] Article 181.
[71] See above, paragraph 38.
[72] See e.g. Rousseau, II Droit international public (1974), 308.

98 The official position of the Greek Cypriot authorities with regard to the constitutional crisis of 1963 is that the Constitution "proved unworkable in many of its provisions and this made impossible its smooth implementation"[73]. They apparently maintain that they are continuing to operate the 1960 Constitution, subject to the doctrine of necessity. This is how they put it in the case of *Cyprus -v- Turkey*:[74] " The Constitution of the Republic remains in force and is applied by the Government of Cyprus subject to the well established doctrine of necessity, i.e. to the extent that it is impossible to comply with some of its provisions that require the participation of the Turkish Cypriots, the Government has to take exceptional measures which, though not in conformity with the strict letter of the Constitution, are necessary to save the essential services of the State temporarily until the return to normal conditions so that the whole State might not crumble down".

99. This statement is, however, open to question. In the first place, the state of necessity seems to have been largely self-induced. Secondly, as a matter of *constitutional* law in common law countries, it is very controversial whether necessity is in fact a justification for violating the provisions of the constitution. Moreover, it is not just a question of domestic law: as we have seen, the constitutional settlement in this case was underpinned by valid and subsisting international commitments.

Application of the relevant provisions of the Treaties and Constitution

100. On 4 July 1990, the authorities in Nicosia applied for accession to the (then) European Communities. The TRNC responded by sending to the Council of Ministers

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[73] "RC", Cyprus: The Way to Full EU Membership (3rd ed., 1995), p. 5.
[74] European Commission on Human Rights, 13 Decisions & Reports (1978), p.116.

a Memorandum dated 12 July 1990, and a Supplementary Note dated 3 September 1990, setting out its objections to the application.

101 The European Commission handed down a favourable opinion on 30 June 1993. In its opinion, the Commission referred to the challenge to the application by the "*de facto* authorities of the northern part of the island". It went on:

> these authorities rejected the right of the Government of the Republic of Cyprus to speak for the whole of Cyprus in such an approach. They based their position on the Guarantee Treaty and the wording of the 1960 Constitution, which grants the President and Vice President (a Turkish Cypriot) a veto over any foreign policy decision, particularly any decision on joining an international organisation or alliance that does not count both Greece and Turkey among its members. They consider, accordingly, that in the prevailing circumstances the Community should not take any action on the application.

The Commission dismissed these arguments by stating that: "The Community, however, following the logic of its established position, which is consistent with that of the United Nations where the legitimacy of the government of the Republic of Cyprus and non-recognition of the 'Turkish Republic of Northern Cyprus' are concerned, felt that the application was admissible".[75]

102 There is no proper analysis of the TRNC's argument, so it is unclear what exactly is the "logic of the Community's established position". What the Commission seems to have meant was that, having adopted a policy of non-recognition of the TRNC, it had to recognize the Nicosia authorities as alone entitled to represent the RC. Be that as it may, it appears, however, that the Commission's main concern at this time was whether Cyprus met the European Community's own requirements for membership, not

[75] Doc. COM/93/313 final, 30 June 1993, p. 4.

whether there were any impediments to membership under the Treaties establishing the Republic, or the Republic's own Constitution.

103. No further reference was made to these legal arguments in either the Council's conclusion that it supported the Commission's opinion on 4 October 1993, nor in the European Parliament's resolution of 12 July 1995 endorsing the Commission's opinion and the Council's conclusions.

104. There are valid objections, however, to the application to join the European Union, based on the London, Zurich and Nicosia agreements, which I shall now discuss.

105. A very important provision in this regard is Article I(2) of the Treaty of Guarantee, by which "[The Republic of Cyprus] undertakes not to participate, in whole or in part, in any political or economic union with any State whatsoever. It accordingly declares prohibited all activity likely to promote, directly or indirectly, either union with any other State or partition of the Island." This language is certainly wide enough to cover the accession of the RC to the EU.

- Membership would amount to participation in whole, let alone in part, in an economic union.[76]

- To the extent that the EU also constitutes a political union, this part of the undertaking would also be infringed.

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[76] There are some interesting parallels here with the Austro-German Customs Union case (1931), PCIJ Ser. A/B, no. 41, p. 37, in which the Permanent Court of International Justice held that Austria's entry into a customs union with Germany would constitute an alienation of its economic independence, contrary to Geneva Protocol I of 4 October 1922.

- Membership would also be "likely to promote, directly *or indirectly*, union with" Greece. The very name of the organization, the European Union, bears out the fact that it is about union between the members.

106 It might perhaps be objected that the text uses the singular "any State" in two places, whereas the union in question would be with *States*. However, such an objection would be unfounded. Admittedly, what the framers were particularly concerned about was union with either Greece or Turkey - single States. Nevertheless, as a matter of drafting and the ordinary use of the English (and French) language, the singular usually includes the plural and "any State (whatsoever)" is wide enough to encompass "any States (whatsoever)".[77] This interpretation also accords with common-sense. Suppose, for example, that Cyprus had joined an economic or political union whose only other members were Greece and, say, Malta. It is hard to believe that this would not have come very close to *enosis*, and sufficiently close for the draftsmen, if asked by the proverbial "officious bystander", to have replied that they certainly intended to prohibit such a thing. It would be no answer to this point to observe that we are here dealing with a union involving fifteen other States, not two. Cyprus is far more closely connected to Greece politically, militarily, economically, ethnically, and geographically, than it is to any other member State, and this situation would no doubt continue after accession. Furthermore, it should be noted that in Article I(2) the Republic not only undertook to refrain from participating in any political or economic union: it even promised to refrain from "*any activity* aimed at promoting, *directly or indirectly* ... union of Cyprus with any other State".

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[77] The UK's Interpretation Act 1978 (c. 30), s. 6 provides, for instance: "In any Act, unless the contrary intention appears ... (c) words in the singular include the plural and words in the plural include the singular". Similarly section 1 of the Code of the Laws of the United States of America: 1 USC, sect. 1, (1982).

107. It is not just the RC who gave undertakings in this regard. The counterpart of its undertaking in Art. I(2) is that of the three Guarantors, in Art. II(2). Having noted the RC's undertakings, they "likewise undertake to prohibit, so far as concerns them (pour ce qui relève d'eux), any activity aimed at promoting, directly or indirectly, ... union of Cyprus with any other State". It follows, in my view, that the two Guarantors concerned, the UK and Greece, are under an obligation of their own to refrain from promoting Cyprus' membership of the EU and, indeed, to use their veto to prevent it.

108. Various provisions of the Cyprus Constitution bear out this interpretation.[78] It will be recalled that in Art. I of the Treaty of Guarantee, the RC undertook to ensure "respect for its Constitution", whilst in Art. II, the three other parties guaranteed "the state of affairs established by the Basic Articles of its Constitution". These Articles derive to a considerable degree from the Basic Structure agreed at Zurich and London, to which the RC, the three Guarantors, and the two Cypriot communities agreed.

- Art. 185(2) provides that "The integral or partial union of Cyprus with any other State ... is excluded".

- Art. 170 provides in pertinent part that "The Republic shall, by agreement on appropriate terms, accord most-favoured-nation treatment to the Kingdom of Greece, the Republic of Turkey and the United Kingdom of Great Britain and Northern Ireland for all agreements whatever their nature might be." This implements Art. 23 of the Basic Structure. It will be recalled that, at the London meeting of 12 February 1959 of the three Foreign Ministers, the question of its meaning was discussed.[79] In reply to a question from Lord Perth, the Foreign Ministers of Turkey and Greece indicated that "The intention was to exclude more favourable bilateral agreements between Cyprus and

[78] See above, paragraphs 34-39.
[79] Above, paragraph 8.

countries other than the Three Powers, and *also to avoid the possibility of either Greece or Turkey securing a more favourable position in Cyprus than the other - of Greece, for example, establishing a kind of economic enosis"*. The proposed entry of the RC into the EU would doubly violate the letter and spirit of this provision. In the first place, it would tend to encourage the kind of economic *enosis* with Greece which the drafters of the Zurich and London agreements plainly intended to prohibit. Secondly, there can be no doubt that, if Cyprus joined the EU, this would result in Greece and the UK receiving considerably more favourable treatment than Turkey, which is not a member.

- Article 50 implements Article 8 of the Basic Structure, in providing (in pertinent part) that "The President and the Vice-President of the Republic, separately or conjointly, shall have the right of final veto on any law or decision of the House of Representatives or any part thereof concerning - (a) foreign affairs, except the participation of the Republic in international organisations and pacts of alliance in which the Kingdom of Greece and the Republic of Turkey both participate." [80] This question, too, came up at the Foreign Office meeting on 12 February 1959, albeit at that stage in connection with the proposed Art. I(2) of the Treaty of Guarantee.[81] In response to the British Foreign Secretary's question whether this provisions would preclude membership in international associations - that is, intergovernmental organizations - such as a possible European Free Trade Area, "M. Zorlu and M. Averoff both made it clear that there would be no objection to Cypriot membership of international associations of which *both* Greece and Turkey were members, e.g. the [Universal] Postal Union, and any Free Trade Area". The corollary is that there could well be objection to membership of an organization of which only one of these two was a member.

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[80] See also paragraph 34 above.
[81] Above, paragraph 7.

- It might perhaps be objected that the mechanism chosen to further this goal was the Vice-Presidential veto, but since there is no longer a [Turkish] Vice-President to wield the veto, the provision is a dead letter. But in my view, such an objection would not be valid. It seems that the main reason why there has not been such an official for some time is that, from 1963/4 onwards, he was prevented by the Greek Cypriots from acting. In any case, the Vice-President's veto was but the mechanism by which the Turkish *community* could be assured that the Republic would not join an organization of which Greece alone was a member (and vice-versa). In other words, it was clearly the intention to prohibit membership of organizations with this sort of partial membership, unless both communities agreed. It is quite clear from the above-mentioned TRNC Memorandum and supplementary Note to the EU that the Turkish community does indeed object.

- The interchange at the Foreign Office meeting also provides the clearest proof that the drafters of the Treaty of Guarantee understood the references in it to "union with any State" to include States (in the plural), and specifically to include international organizations of States, of which the EU is, of course, a specimen. It will be noted that it was specifically in the context of proposed Article I(2) of the Treaty of Guarantee that the exchange took place.

109 I therefore conclude that the application by the Greek Cypriot administration to join the EU is in breach of its treaty obligations, not to mention its purely domestic legal obligations; and, further, that any encouragement of such an application by Greece or the UK, or a failure use their veto or any other necessary means to prevent its succeeding, would be a breach of the treaty obligations of those two States towards each other, towards Turkey, and towards the inhabitants of Cyprus as a whole.

Does the constitution of the European Union permit or envisage applications such as the present one?

110. Article O of the Treaty on European Union reads:

> Any European State may apply to become a member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members.
>
> The conditions of admission and the adjustments to the Treaties on which the Union is founded which such admission entails shall be the subject of an agreement between the member States and the applicant State. This agreement shall be submitted for ratification by all the Contracting States in accordance with their respective constitutional requirements.

111. "European" is deliberately not defined, so as not to limit the frontiers of the European Union.[82] The Commission in its opinion said that Cyprus had "beyond all doubt" a European identity and character. It is less convincing about whether or not the Nicosia authorities can claim to represent all the people of Cyprus and indeed the State of Cyprus, and undertake obligations on their behalf which it is able to perform. On the one hand the Commission advises that the member States of the European Union recognise the Nicosia Government as the only legitimate government representing the Cypriot people; but on the other, the Commission acknowledges the *de facto* partition of the island and separation of the communities, and the consequence that:

> the fundamental freedoms laid down by the Treaty, and in particular freedom of movement of goods, people, services and capital, right of establishment and the universally recognized political, economic, social and cultural rights could not today be exercised over the entirety of the island's territory. These freedoms

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[82] Booss & Forman, "Enlargement: Legal & Procedural Aspects", 32 CML Rev. (1995), pp. 95, 98.

would have to be guaranteed as part of a comprehensive settlement restoring constitutional arrangements covering the whole of the Republic of Cyprus.[83]

112. The European Court of Justice has itself highlighted the practical difficulties which stand in the way of effect being given to the principles to which the Commission referred. R. v. Minister of Agriculture, Fisheries & Food, ex. parte S. P. Anastassiou (Pissouri) Ltd. [84] arose on a request from the English High Court of Justice for a preliminary ruling. It concerned the question of the certification of agricultural products originating in Cyprus, under the EEC-Cyprus Association Agreement. The goods in question originated in the TRNC, and the UK and the Commission argued that, in the circumstances obtaining in Northern Cyprus, Member States were obliged to accept movement and phytosanitary certificates emanating from the *de facto* authorities there, in order to prevent discrimination between nationals or companies of Cyprus. The Court recognized the practical difficulties, but in its Judgment[85] held that this did not warrant a departure from the clear terms of the 1977 Protocol on the origin of products and administrative cooperation, when the Community and its members, and of course the Nicosia authorities themselves, did not recognize the TRNC.

113. The TRNC has argued that the Greek Cypriot Government has no authority to represent the whole of the country, or the Northern part of it. But aside from that, there can be little doubt that the Anastassiou case is symptomatic of the practical and legal problems that can arise if the RC is admitted to the EU. The Nicosia Government will in many respects not be in a position to fulfil its undertakings towards the other Members; and the other Members may well experience practical difficulties in fulfilling their obligations towards Cyprus as a whole. Moreover, the EU is not only the about

[83] Opinion of the Commission, doc. COM/93/193 final, paras 8-10.
[84] [1994] 1 ECR 3087.
[85] Esp. at paragraph 37 ff.

reciprocal rights and duties of States: it is also about individual rights of the citizens of the Union, and in that regard, too, there could well be very serious difficulties. [86]

114. No member has yet been admitted to the EU whose writ did not run over virtually the whole of its territory.[87] But the Greek Cypriot administration it is unable to exercise its authority over about one-third of the territory which it claims to represent. The difficulties to which this could give rise would be unprecedented in the history of the Union.

115. In its Opinion, the Commission frankly recognized these difficulties. But its solution was to press on regardless. It seems to hope that, by agreeing that the Greek Cypriot administration is eligible for admission, it will assist the Security Council or otherwise contribute to the political solution of the Cyprus problem. Opinions may differ as to whether the EU's action will prove a positive contribution: the opposite could turn out to be the case. But confining ourselves to the more strictly legal domain, what can be said with confidence is that, if the EU went so far as to admit the RC before a political solution had been reached, the technical difficulties are likely to be very great indeed.

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[86] Cf. Booss & Forman, op.cit., p. 101.

[87] The case of the Federal Republic of Germany before unification with East Germany is not, as it might at first sight appear, a precedent. The Federal Republic did not claim to have, and did not possess, the power to conclude treaties on behalf of East Germany, and it did not purport to exercise sovereignty there. Cf. Mann, "Germany's Present Legal Status Revisited", 1967 ICLQ, 760, reprinted in his Studies in International Law (1973), p. 660, esp. at p. 702; O'Keefe, "The Legal Implications of East Germany's Membership of the European Community", 1990-91 Legal Issues of European Integration, p. 1.

SUMMARY AND CONCLUSIONS

116. The Treaty of Guarantee of 1960, along with its associated instruments, strikes a carefully constructed balance between the interests of the two Cypriot communities, and also between the three States with a particular interest in Cyprus: Greece, Turkey and the United Kingdom. It is the basis of the independence of Cyprus, of the special rights and responsibilities of the Guarantor States, and of the continued military presence of the UK on the island. As has been shown above,[88] there are no convincing grounds for impugning either the initial validity or the continuance in force of the relevant provisions of the Treaty. The Guarantors - the United Kingdom, Turkey and - it seems - Greece indeed continue to recognize its validity, which is also the position of the UN Security Council.

117. Turning to the substance, we have seen[89] that, by Article I(2) of the Treaty of Guarantee, the Republic of Cyprus undertook "not to participate, in whole or in part, in any political or economic union with any State whatsoever". Membership of the EU would constitute participation in whole or in part in an economic union, and at least in part in a political union. The conclusion must be, therefore, that this would be contrary to the Treaty of Guarantee. To try and escape this conclusion by arguing that the Treaty prohibits only union with a State, not States in the plural, would not only do violence to the ordinary meaning of the words, their context and their object and purpose: it would also run counter to the express intentions of the Governments who drafted this provision. For, as has been shown,[90] they considered membership of international economic and political organizations specifically in the context of these clauses in the Treaty. By definition, such organizations would comprise other States, in the plural. The drafters were only prepared to relax this ban if the organization was

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[88] Paragraphs 78-99.
[89] Above, paragraphs 105-9.
[90] Above, paragraphs 7 & 108.

one in which both Greece and Turkey both participated: but such is not the case with the EU. Furthermore, Article I(2) goes on to prohibit, not just participation (in whole or in part) in an economic or political union, but even "all activity *likely to promote, directly or indirectly* ... union with any other State...". It cannot be gainsaid that membership of Cyprus in the EU is likely to promote, directly or indirectly, union with other States, and most particularly with Greece.

118. Nor was this the only undertaking of Cyprus. By paragraph (1) of the same Article it also "undertakes to ensure the maintenance of its independence, territorial integrity and security, as well as respect for its Constitution". And we have also seen[91] that Constitution not only included provisions expressly echoing the words of Article I of the Treaty, but also others directly in point. Article 170 guarantees most-favoured-nation treatment to *each* of the Guarantors whereas, manifestly, if Cyprus became a member of the EU, Greece and the UK would have necessarily to receive more favoured treatment than Turkey. Moreover, Article 50 of the Constitution expressly gave the Turkish Vice-President, as the representative of his community, a veto over Cyprus' membership in any international organization unless both Greece and Turkey were members. These were amongst the select group of unamendable "Basic Articles" in the Constitution which the Republic of Cyprus undertook in the Treaty of Guarantee to respect.[92] For all the above reasons it seems clear that Nicosia would violate its treaty obligations by seeking or accepting membership in the EU.

119. For their part, the Guarantor States also undertook important legal obligations. By Article II(1) of the same Treaty, these three States took "note of the undertakings

[91] Above, paragraph 108.
[92] Above, paragraphs 34-38.

of the Republic of Cyprus in Article I" and "recognize[d] and guarantee[d]", *inter alia*, the state of affairs established by the Basic Articles of the Constitution. Furthermore, in paragraph (2), reflecting the corresponding undertaking by the RC in Article I(2), they "likewise undert[ook] to prohibit, so far as concerns them, any activity aimed at promoting, directly or indirectly, ... union of Cyprus with any other State...". Admittedly, this guarantee is not completely unqualified: it extends only "so far as concerns them" or, as the original version had it,[93] "so far as lies within their power". But it certainly does lie within the power of the UK (and, indeed, of Greece) to prevent a violation of the Treaty by the simple exercise of their veto.

120. Furthermore, given that at least *de facto* (on any view) the writ of Nicosia does not run throughout Cyprus, if that country were to join the EU there would be considerable practical and legal obstacles in the way of Nicosia's implementation of duties which would have to be undertaken towards other members in respect of the island as a whole. For their part, the other members would in practice find it extremely difficult, if not impossible, to carry out their legal obligations in respect of Cyprus as a whole. The EU Commission and Court, as well as the UK Government, have frankly recognized these difficulties;[94] but they have so far failed to draw the appropriate conclusions.

121. The undertakings of the RC and of the three Guarantor States are not mere political statements. They are solemn legal promises embodied in a formal treaty. And what is given by this particular treaty is a *guarantee*,[95] the most solemn form of pledge known to law. All four of the States concerned obtained benefits under the Treaty of Guarantee; but with these benefits came obligations. International law, by which the

[93] Above, n. 13.
[94] Above, paragraphs. 112-5.
[95] Or, more precisely, a series of guarantees.

United Kingdom and other members of the EU set great store, demands that these obligations be performed.

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